IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 734 OF 2006

WITH

CIVIL APPLICATION NO. 994 OF 2006

Edna Mathew Thekkakara ..... Appellant
(Ori. Plaintiff)

Versus

Mrs. Tassy Joseph Demello & 21 Ors. ..... Respondents
(Ori. Defendants).

Mr. Abhay Abhyankar i/b P.G. Pravin for Appellant.

Mr. G.P. Mulekar, APP

Mr. Vijay Thorat i/b Bipin Joshi for Respondent no.5

Mr. R.D. Soni with Sanjeev Singh for Respondent Nos. 1 to 4.

CORAM : D.G. KARNIK, J.

DATE : 28TH NOVEMBER 2006

P.C.

1) Heard learned counsel for the parties. This appeal is directed against the order dated 27th and 28th July 2006 passed by the City Civil Court, Mumbai rejecting the appellants motion for interim injunction.

2) Brass Manuel Alex and John Manuel Alex were the real brothers. The appellant is the daughter of Brass and Respondent nos. 1 to 4 are the descendants of John. By a sale deed dated 3Oth November 1954, Brass

purchased northern half portion of the property bearing survey no. 157, Hissa no. 1, Ghatkopar (W) to the extent of 4280 sq. yards and the sale deed is registered at serial nos. 7768 of the year 1954 in the Office of Sub Registrar, Bombay. By another sale deed of the same date i.e. 3Oth November 1954, John purchased the southern half portion of survey no. 157, Hissa no.1 Ghatkopar (W) to the extent of 4280 sq. yards and the sale deed is registered at serial no. 1684 of the year 1955 in the office of the Sub Registrar, Bombay. The appellant became the owner of the northern half portion of survey no. 157/1 and the respondents became the owner of southern half portion of survey no. 157/1 after death of Brass and John respectively.

3) The appellant filed suit, bearing Suit No. 1047 of 2006, against the respondent Nos.1 to 4 and the purchaser from them and others for injunction restraining them from disturbing their possession of the suit property. The dispute is regarding whether the suit property is the northern part of survey no. 157/1 purchased by Brass under the sale deed dated 30th November 1954 or is the southern half portion of survey no. 157/1 purchased by John under the sale deed of even date.

4) In order to ascertain whether the suit property is northern part or southern part of original survey

no.157/1 it would be necessary to look to the boundaries of the suit property and in particular southern and northern boundaries thereof. The appellant has not mentioned the boundaries of the suit property in the plaint. This was absolutely necessary as the dispute is regarding identity of the property. In the absence of the proper description with proper boundaries, in my view the suit itself is not maintainable for want of compliance of Order 7, Rule 3 of C.P.C. In any event, it cannot be said that the appellant has made out strong prima facie case.

5) Mr.Abhyankar,learned counsel for the appellant, referred to and relied upon the order passed in Notice of Motion NO. 106 of 1993 in suit no. 1256 of 1983 and contended that the said order shows that the appellant was in possession of the suit property. He therefore submitted that the appellant is entitled for an injunction. Suit No. 1256 of 1983 was filed by the appellant against Mr. Shinde Retiwala for relief of injunction alleging that the appellant was in possession of the property, which was the subject matter of that suit. The appellant had alleged that Shinde Retiwala was trying to disturb his possession. At the motion stage, trial court held that Mr. Shinde Retiwala was not in possession of the property in that suit, but the appellant was in possession. I fail to understand how the said finding can of any use in this suit. Admittedly that suit was only against Mr.

Shinde Retiwala and none of the respondents were the parties to the said suit. Any finding given in that suit would be a finding in personem and that finding would not binding in the present suit against the respondents who were not parties to the earlier suit.

6) Mr. Abhyankar then submitted that John, through whom the present respondent Nos. 1 to 5 claim had also filed another suit bearing Suit No. 1240 of 1983 against the present appellant. In the said suit, John had taken out a motion bearing N.M. no. 1809 of 1983 for an injunction restraining the appellant from restraining his possession. The said motion was dismissed. At the hearing of the motion possession of John was not proved and therefore that finding would be relevant and it must be held that John was not in possession of the suit property. It may be noted that during the pendency of the said suit, John died on 19th December 1989 and his heirs were not brought on record, therefore the suit stood abated. The effect of the order of abatement would be that the heirs of John would not be able to file another suit for injunction because of bar created under Order 22, Rule 9 of the C.P.C. Rule 9 of Order 22 provides that where the suit abates or dismissed under Order 22, no fresh suit shall be brought on the same cause of action. However, explanation to Rule 9 provides that the bar created as above would not bar a defence in a later suit based upon the facts which constituted the cause of action in

the suit which had abated. Thus the abatement of suit No. 2043/1983 would not be a bar to the respondent Nos. 1 to 4 or persons claiming under them from taking up a defence which constituted the cause of action in the earlier Suit No. 2043 of 1983. The respondents would be entitled to contend that they are the owners and are in possession of the suit property. The finding given in a Notice of Motion No. 1809 of 1983 taken out in the Suit No. 2043 of 1983 being a finding given at the interlocutory stage would not operate as res judicata in a subsequent suit. It could have operated as res judicata at an interim stage in the same suit as held by Supreme Court in the case of Arjun Singh v/s Mohindra Kumar reported in AIR 1964 S.C. 993. Therefore, in my view the finding recorded in Notice of Motion No. 1809 of 1983 against John about his possession would not be relevant for the purpose of considering the present appeal.

7) In my view, the appellant has not produced sufficient evidence to show prima facie that she is the owner and in possession of the suit property. She has not shown that the suit property is the same (northern half of S.No. 157/1 as purchased by Brass). I am satisfied that the appellant has not made out a strong prima facie case necessary for grant of injunction. The Trial Court was therefore right in rejecting the motion.

8) The appeal is accordingly dismissed summarily.

(D.G. KARNIK, J.)